

\$~R-51

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on 29th October, 2014

+ RFA 359/2005

P.D. VERMA AND CO. Appellant
Through : Mr. K.R. Chawla, Adv.

versus

LAXMI BUILDERS Respondent
Through : Mr. P.D. Gupta and Mr. Abhishek
Gupta, Adv.

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

A.K.PATHAK, J.(ORAL)

1. By the impugned judgment and decree suit of the appellant-plaintiff for recovery of ₹6,45,300/- against the respondent-defendant has been dismissed by the Trial Court. Aggrieved by the judgment and decree, appellant has preferred this appeal.

2. Appellant alleged in the plaint that appellant was sole proprietorship firm of Sh. Prabhu Dayal Verma and was engaged in carrying out work of fixing pipes and sanitary installations on job work basis. In the month of April, 1991 respondent awarded contract to appellant for fixing of water supply pipes and sanitary installations in the residential flats constructed by

Indraprastha Cooperative Group Housing Society Ltd. Delhi. Appellant was given a room for storing the tools and equipments. Appellant carried out work in the said society pursuant to the work order and raised running bills from time to time. On 5th June, 1991 appellant submitted first running bill amounting to ₹63,000/- against which respondent paid only ₹59,025/-. Thereafter, a formal contract was reduced in writing on 22nd June, 1991. On 6th August, 1991 appellant raised second running bill for ₹64,830/- against which ₹64,243/- was paid. Third running bill for ₹40,054.50 was raised on 7th September, 1991, against which ₹39,527/- was paid. Fourth running bill dated 22nd September, 1991 for a sum of ₹81,495/- was raised by the appellant, against which ₹79,052/- was paid. On 5th January, 1992 fifth running bill for a sum of ₹1,46,925/- was raised, against which respondent paid ₹99,108/-. Against sixth running bill dated 10th February, 1992 of ₹1,50,838.50, respondent paid only ₹74,160/-. Against seventh running bill dated 7th March, 1992 for ₹1,46,437.50, respondent paid only ₹84,048/-. Similarly, against eighth and ninth running bills dated 1st August, 1992 and 25th September, 1992 for ₹2,63,989.50 and ₹5,63,946.50, respondent paid only ₹98,880/- and ₹1,83,917/-, respectively. After completion of work, appellant raised final bill dated 29th May, 1993 for ₹6,36,349.50, against

which only ₹88,992/- was paid on 27th March, 1993. All the payments were made through cheques. Respondent did not pay remaining amount of ₹5,47,357.50, inasmuch as did not allow the appellant to remove his equipments and other materials valuing ₹10,500/- which were lying in the store room. Since dues of the appellant were not paid despite legal notice dated 20th September, 1993, hence the suit for recovery of ₹6,45,300 which amount included interest @12% per annum from 29th May, 1993 to 24th April, 1995.

3. In the written statement, respondent alleged that suit was not maintainable as the same was filed by a sole proprietor ship firm. In fact, appellant was a partnership firm. Respondent alleged that appellant was engaged by the respondent only for carrying out the works relating to water supply and sanitary installations in few blocks of the residential flats. It was denied that bills as mentioned in the plaint were submitted by the appellant. Respondent alleged that running bills were never submitted by the appellant. Respondent had been making payments to appellant from time to time on the basis of works executed by it. Works done by the appellant were assessed and calculated by the staff of respondent, on the basis whereof payments were made through cheques on regular basis, so as to enable the

appellant to arrange for labour for execution of the work. Work order dated 22nd June, 1991 did not provide for execution of any additional works other than water supply and sanitary installation works. There was no provision in the work order for making payment for any such additional work. As per the respondent, bills as detailed in the plaint were never submitted with the respondent. Respondent alleged that bills were fabricated by the appellant and were false. Appellant was a plumber / contractor for executing sanitary installations only on labour rate contract basis. Accordingly, work order was given by the respondent to appellant for executing of such works only. Respondent had paid a total sum of ₹8,46,410/- to appellant, after deducting TDS of ₹9,590/-, against the total works done by the appellant. Details of the cheques were given in the written statement, which reads as under:-

Cheque No.	Date	Amount	TDS	Total
044229	09.07.1991	60,000.00	675.00	59,325.00
98015	13.08.1991	65,000.00	728.00	64,272.00
98042	16.09.1991	40,000.00	448.00	39,552.00
98083	24.10.1991	80,000.00	896.00	79,104.00

48996	10.01.1992	75,000.00	840.00	74,160.00
51849	10.02.1992	75,000.00	840.00	74,160.00
101543	29.02.1992	85,000.00	952.00	84,048.00
102184	05.08.1992	80,000.00	896.00	79,104.00
105501	19.08.1992	20,000.00	224.00	19,776.00
105584	29.09.1992	95,000.00	1,064.00	93,936.00
148611	23.10.1992	91,000.00	1,019.00	89,981.00
157026	24.03.1993	90,000.00	1,008.00	88,992.00
	Total	85,56,000.00	9,590.00	8,46,410.00

4. Respondent further alleged that another total sum of ₹1,24,000/- was paid to appellant in cash between 1st May, 1991 to 29th July, 1992 so as to enable the appellant to make day-to-day payment to his labour at the spot. In fact appellant had received ₹9,80,000/- for sanitary works executed by it for which no bills were submitted with the respondent. As per the respondent, appellant was not entitled to any amount and suit was liable to be dismissed.

5. In the replication, appellant denied averments made in the written statement and reiterated what was stated in the plaint. It was denied that

₹1,24,000/- was paid in cash during the period as alleged in the written statement. Other payments were not disputed.

6. Following issues were framed on 16th August, 2002:

1. Whether plaintiff was awarded and it executed works other than sanitary, as alleged?
2. Whether plaintiff is entitled to recover ₹5,47,357/- towards principal amount and ₹87,443/- towards interest @ 12% per annum from 29th May, 1993, to 21st May, 1995, as claimed?
3. Whether plaintiff left the equipments, tools and other materials worth ₹10,500/- in the storeroom at the site and the same was removed by the defendant?
4. Whether the suit as framed is not legally maintainable as alleged in para no.1 of the preliminary objections of written statement?
5. Whether defendant made payment of ₹1,24,000/- in cash on various dates from 1st May, 1991, to 21st May, 1992, to the defendant?
6. Relief.

7. It may be noted here that suit was initially filed in the High Court but was subsequently transferred to District Court on 23rd September, in view of increased pecuniary jurisdiction of the High Court.

8. Appellant examined Sh. Prabhu Dayal Verma as PW1 who filed his affidavit in his examination-in-chief. He exhibited certain documents as Ex. PW1/1 to Ex. PW1/14. He was cross-examined by the Appellant's counsel. Appellant also examined one Sh. Omkar Singh as PW2. As against this, respondent examined its partner Sh. Sunil Khemani as DW1, who filed his affidavit and exhibited certain documents as Ex. DW1/1 to Ex. DW1/13. After hearing the learned counsel for the parties and upon scrutiny of entire documentary as well as ocular evidence on record, trial court vide impugned judgment and decree has dismissed the suit. Issue-wise findings have been given by the Trial Court. As regards issue no. 4, trial court has held that sole proprietorship firm M/s. P.D. Gupta and Co. was not a legal entity and could not have sued in its own name inasmuch as suit ought to have been filed in the name of proprietor instead of in the name of proprietorship firm. As regards issue no. 5 is concerned, trial court has held that respondent had failed to prove that ₹1,24,000/- was paid by it to appellant in cash on various dates between 1st May, 1991 to 29th July, 1992. Issue nos. 1 to 3 have been

decided together. Trial court has held that the bills Ex. PW1/1, Ex. PW1/3 to Ex. PW1/10 were not reliable to foist any liability on the respondent, in as much as were fabricated documents. Trial court has held that payments made against each bill could not have been reflected in the bills which indicated that some were fabricated. As per the usual practice, bills are raised first and then the payment is made. Payment would not precede the bill, more so, when the same was not given as advance. As regards non-production of original bills by the respondent despite order of the Court is concerned, trial court has held that no adverse inference can be drawn, since the bills were found suspicious, inasmuch as PW1 had admitted in his cross-examination that whenever bills were tendered, same were not accepted by the respondent. As regards non-production of measurement book is concerned, trial court has held that no such adverse inference can be drawn when the bills Ex. PW1/1, Ex. PW1/3 to Ex. PW1/10 were found to be tainted and unreliable. Trial court has further observed that appellant had failed to lead any convincing evidence on record to show that he had left equipments, tools and other materials worth ₹10,500/- at the site and the same were removed by the respondent.

9. I have heard learned counsels for the parties and perused the entire trial court record carefully and do not find any illegality or perversity in the impugned judgment and decree, inasmuch as I am of the opinion that view taken by the trial court is a possible view. It is trite law that burden to prove a fact lies on such person, who alleges the same. Accordingly, burden to prove the facts, as alleged in the plaint, heavily rests on the appellant. Plaintiff cannot rely on the weakness of defence of the defendant and has to stand on his own legs. Plaintiff is under legal obligation to lead cogent evidence to substantiate the pleas taken in the plaint to prove the case as set in the plaint. In Rangammal vs. Kuppuswami and Anr. AIR 2011 SC 2344, Supreme Court has held thus: "Section 101 of the Indian Evidence Act, 1872 defines 'burden of proof' which clearly lays down that whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon

whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.”

10. The case, as set up by the appellant before the trial court, was that it had executed various works as mentioned in the bills but only part payments thereof were made by the respondent. The payments in respect of running bills were not fully paid. Only part payment was made against each running bill. Accordingly, a final bill was raised after completion of the work, against which also only part payment was made. Accordingly, onus was on the appellant to prove the above plea by leading cogent evidence. In my view plaintiff has failed to prove its case. First of all, a perusal of bills Ex. PW1/1, Ex. PW1/3 to Ex. PW1/6 shows that these bills are in respect of civil work and do not pertain to the sanitary work. Appellant has admitted in his cross-examination that he was not a civil contractor. He was a plumber and was doing sanitary work. It has been further admitted that sanitary work was awarded to him, inasmuch as this fact is established from a perusal of work order Ex.PW1/2. If no such work was awarded, question of raising any bills in this regard does not arise. It has not been pleaded in the plaint that any civil work was awarded to the appellant by the respondent. Even in

the affidavit of evidence, no such plea has been taken. It is only in his cross-examination PW1 has volunteered that respondent had orally asked him to execute the civil work as well. His this statement being beyond pleadings, cannot be accepted. Even otherwise, it is improbable that appellant, who was specialized in sanitary works, would have been asked by the respondent to perform civil works by giving oral instructions, more so, when a written contract (Ex. PW1/2) was executed between the parties on 22nd June, 1991 with regard to sanitary works alone.

11. Secondly, these bills are suspicious since payments made by the respondent through cheques have been duly reflected in these bills. As per the normal practice, the bill is raised first and only thereafter payment is made. Bill is normally raised after execution of work and payment follows the bill. If any advance is paid same is given adjustment of. It is not the case that the payments, as reflected in these bills, were made as advance payments. In his cross-examination, appellant has stated that the payment used to be made after 5/7 days of submission of the bills. If that is so, then payments made against each work, as mentioned in the bills, could not have been reflected in the bills. Trial Court has rightly held that the bills were tainted and suspicious and appears to have been fabricated.

12. Learned counsel for the appellant has vehemently contended that since original bills were not produced by the respondent, therefore adverse inference has to be drawn against the respondent. I do not find any force in this contention. PW1 in his cross-examination has himself admitted that the bills were not submitted to respondent. His plea is that whenever appellant tried to submit the bills, same were not accepted by the respondent. Accordingly, no adverse inference can be drawn.

13. As regards issue no. 5 is concerned, same has been decided against the respondent. Respondent has not challenged finding of Trial Court by filing an appeal or cross objection, thus, I need not to delve on this issue. As regards issue no. 4 is concerned, in my view, approach adopted by the trial court is not correct. Shri Prabhu Dayal Verma is the sole proprietor of M/s. P.D. Verma & Co. It is not the case that suit was filed only in the name of M/s P D Verma & Co alone. In fact Shri Prabhu Dayal Verma has been impleaded in the case as sole proprietor of the firm M/s. P.D. Verma & Co. It is trite law that a sole proprietorship firm has no separate legal entity and is nothing but creation and/or firm name of the sole proprietorship firm. Meaning thereby, any reference made to sole proprietorship firm, shall mean and include the sole proprietor and vice versa. Accordingly, it cannot be

said that suit filed by the sole proprietorship firm through its sole proprietor was not maintainable.

14. For the foregoing reasons, appeal is dismissed.

A.K. PATHAK, J.

OCTOBER 29, 2014

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